Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1977

No. 77-953

Buffalo River Conservation and
Recreation Council, et al.,.. ..... *Petitioners*

V.

National Park Service, et al.,.. ..... *Respondents*

## PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE EIGHTH CIRCUIT COURT OF APPEALS

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*Attorneys for Petitioners*

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## PETITION FOR REHEARING

Petitioner presents its Petition for a Rehearing of this Court's Order dated March 20, 1977, denying the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, and, in support thereof, respectfully shows:

## GROUNDS FOR REHEARING

1. The Petition for a Writ of Certiorari failed to present adequately a substantial ground significant not only to Petitioner's cause of action but also to an understanding of the government's power of eminent domain under the United States Constitution. Petitioner's argument concerning the constitutionality of Public Law 97-237, 86 Stat. 44 was only half presented; the Petition raised the question as to Congressional authority to condemn land for a national wild river park, but it did not raise the additional issue as to whether the government's power of eminent domain is now limited only by Fifth Amendment considerations of public use and just compensation. The significance of this case to the Petitioners is obvious; their land has been taken from them in the name of public use for the purpose of establishing a park. Their challenge to the constitutionality of the act establishing that park began as an effort to save their own land and to require the government to rationalize its actions toward them. However, their personal interests are coupled with the substantial question as to the extent of legislative authority under the power of eminent domain. *United States v. Gettysburg Electric Railway*, 160 U.S. 668 (1896) cited in the Petition for Certiorari should be considered the beginning rather than the end of the judicial inquiry. A careful reading of that case reveals that the exercise of eminent domain there was pursuant to a specific constitutional power, the war power, and that the case



does not stand for the generalized proposition that the federal government can condemn property for public parks. However, recent lower court decisions speak in terms of a generalized power of eminent domain, bound by Fifth Amendment constraints, to condemn land for parks. See e.g., *Halbert v. Udahl*, 231 F. Supp. 574, (S.D. Fla. 1964); *United States v. 80 Acres of Land*, 26 F. Supp. 315 (E.D. Ill. 1939). No authority has been ascertained, however, that explains or rationalizes the transition from tying eminent domain to an enumerated constitutional power to this latter view. No case has been discovered by Petitioner's research that supports the proposition that property can be constitutionally condemned for park purposes. Dicta to that effect does exist, but the importance of this issue should not be resolved on that basis. The significance of this case, therefore, lies not just in the determination as to whether a particular Congressional act is or is not constitutional, but whether this Court's linking of eminent domain with an enumerated constitutional power has been overruled *sub silentio* by the dicta of lower federal courts.

2. The Petition for Certiorari was filed December 15, 1977 and the Justice Department in its response in opposition states the Petition should be denied because the time limit imposed by 28 U.S.C. 2101(c) was not met. The petitioner's former attorney placed the Petition in the United States mails early on the morning of December 12, 1977 and, as his Affidavit

attached hereto as Appendix A attests, he had reason to believe the Petition would arrive in the Supreme Court Clerk's Office within the statutory time limit.

The language in 28 U.S.C. §2101(c) requires that the Writ "shall be taken or applied for within 90 days after the entry of such judgment or decree." Yet, U.S. Sup. Ct. Rule 22(3), 28 U.S.C. states that a petition "shall be deemed in time when it is filed with the Clerk within the time prescribed by law." It is well established that the Court has said that Rule 22 is not jurisdictional or mandatory and that it may be waived under proper circumstances. See e.g. *Taglianetti v. United States*, 394 U.S. 316 (1969). Here, Petitioner's former attorney believed the Petition for Writ of Certiorari had been applied for within the meaning of 28 U.S.C. §2101(c). The discrepancy in the wording between the statute and the rule supports his opinion, and suggests the Court should not view the delay in filing as a jurisdictional defect since petitioner met the requirements of §2101(c) when he applied for the Petition within the time prescribed. Furthermore, courts all over the country have recently taken judicial notice of the postal service's deficiencies and, as a result, have interpreted more flexible time requirements where parties were dependent on mail service. See e.g., *Arthur Stotter and Doris Stotter v. Commissioner of Internal Revenue*, 69 TC No. 76, CCH Dec. 35,025 (March 16, 1978).

3. If this Court should deny this Petition for Rehearing because of the failure by Petitioner's



former attorney to file the Petition for Writ on time, Petitioner will have suffered irreparable and unnecessary harm. One has only to visit the members of the petitioning Council to understand the human and legal significance of their cases. Many of their families have lived along the Buffalo River for more than 100 years. They have treasured and nurtured their property and the river allowing it to run free and wild so as to attract the attention of people from all over the country. For many years they have permitted access to the river by canoeists and other recreationists. After tending the land for so many years, they are now told the government has the right to condemn it and are ordered to leave. They are not sophisticated people, but they have searched in vain through the Constitution and other public laws for evidence of the government's authority to pass the laws and to enforce them in this action which has occurred during the last few years. Their concern about public use of property raises issues far beyond the boundaries of the river, the park or the State of Arkansas. The issues need resolution and the Council members deserve an opportunity to present their concern and raise their inquiry before this Court.

## CONCLUSION

For the foregoing reasons it is respectfully urged that this Petition for a Rehearing be granted, and that, upon further consideration, Writ of Certiorari issue to the United States Court of Appeals for the Eighth Circuit.

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BY: HILLARY RODHAM &
ALLEN W. BIRD, II

*Attorneys for Petitioners*



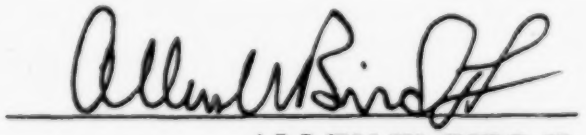
## CERTIFICATE OF COUNSEL

I, ALLEN W. BIRD II, counsel for the above-named petitioner, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, Subdivision 2, of the Rules of this Court.

/s/ ALLEN W. BIRD II
HILLARY RODHAM &
ALLEN W. BIRD II
Counsel for Petitioner

## CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition for Rehearing on the attorneys for the Respondents: Mr. Michael A. McCord, Attorney, Appellate Section, United States Department of Justice, Washington, D.C. 20530; Mr. Larry McCord, United States Attorney, P. O. Box 1524, Fort Smith, Arkansas 72901; and The Solicitor General, Department of Justice, Washington, D.C. 20530 by depositing a copy thereof to each in the United States Mail with the proper postage affixed to this 6th day of April, 1977.



ALLEN W. BIRD II
HILLARY RODHAM
Attorneys for Petitioner

APPENDIX "A"

AFFIDAVIT OF RANDALL TEMPLETON

STATE OF ARKANSAS :
:
COUNTY OF PULASKI :

I, RANDALL TEMPLETON, being duly sworn, do depose and say:

1. I was the attorney for the Buffalo River Conservation and Recreation Council, Et Al in the action against the National Park Service. I filed the Petition for Writ of Certiorari to the United States Supreme Court from the Eighth Circuit Court of Appeals, No. 77-953 in the Supreme Court of the United States.

2. It has been my experience that letters mailed from Little Rock, Arkansas, reach Washington, D.C. within one full day. On December 12, 1977, in the early morning, my law partner Ben D. Rowland, Jr. personally went to the United States Post Office, Main Office, in Little Rock, Arkansas, and placed into the United States Mail the requisite number of Petitions required by the Supreme Court. He mailed them directly to the Office of the Clerk by certified mail. Attached to this Affidavit is the letter I wrote and he mailed accompanying the copies of the Petition for Writ of Certiorari and the receipt for the certified mail



given him by the postal employee who handled this transaction.

3. I believed the mailing of the Petition on the morning of December 12 was sufficient to comply with 28 U.S.C. §2101(c) and Supreme Court Rule 22.

/s/ Randall Templeton
RANDALL TEMPLETON

SWORN TO AND SUBSCRIBED before me this 5th day of April, 1978.

/s/ Gaye B. McCahan
NOTARY PUBLIC

My Commission expires:
9-16-81

ROWLAND & TEMPLETON
ATTORNEYS AT LAW
604-607 THREE HUNDRED SPRING BUILDING
LITTLE ROCK, ARKANSAS 72201

BEN D. ROWLAND, JR.
RANDELL TEMPLETON

AREA CODE (501)
376-3384

December 12, 1977

Mr. Michael Rodak, Jr. CERTIFIED MAIL NO. 039185
Clerk
Supreme Court of the United States
Office of the Clerk
Washington, D. C. 20543

Re: Buffalo River Conservation & Recreation Council, et al.
vs. National Park Service, et al.
Petition for Writ of Certiorari

Dear Mr. Rodak:

Enclosed are forty copies of a Petition for Writ of Certiorari which I would appreciate you filing in this case. I am also enclosing this firm's check number 606 in the amount of $100.00 as the filing fee. By a copy of this letter to each of the attorneys for the Respondents, I am advising them of the filing of this petition. You will note that the Certificate of Service contained in the Petition certifies that I have mailed each of them a copy of this Petition.

Please enter our law firm as the attorneys of record for the petitioners.

Sincerely,

Randell Templeton

RT/md
Enclosures
cc: Mr. Michael A. McCord
Mr. Robert Johnson
The Solicitor General



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WASHINGTON D.C. PM DEC 19 1977

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• If special services are desired, check block(s) on other side.
• Place on gummed ends and attach to back of article.

RETURN TO

PS Form 3811 June 1973

Randell Templeton
ROWLAND & TEMPLETON
ATTORNEYS AT LAW
604 THREE HUNDRED SPRING BLDG.
LITTLE ROCK, ARKANSAS 72201

re: Buffalo River Case

SENDER: Be sure to follow instructions on other side

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☒ Show address where delivered ☐ Deliver ONLY to addressee

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DATE DELIVERED DATE OF DELIVERY (Postmark) (Address where delivered, if requested, include ZIP Code)

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SUPREME COURT, U.S.

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No. 039185

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Mr. Marquis Lodak, Jr. Clerk
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Supreme Court of the U. S.
P.O., STATE AND ZIP CODE
Washington, D.C. 20543

POSTMARK OR DATE
12-12-77

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DELIVER TO ADDRESSEE ONLY ..... 50¢
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July 1969

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5. Save this receipt and present it if you make inquiry.